INDEX

	Page
nion below	1
diction	1
tion presented	2
ute involved	2
ement	2
ons for granting the writ	4
clusion	10
endix A	11
endix B	19
endix C	20

CITATIONS

s:	
Acton v. *United States*, 401 F.2d 896, certiorari denied, 393 U.S. 1121, 395 U.S. 945	6
Boom Co. v. *Patterson*, 98 U.S. 403	7
Ford & Son v. *Little Falls Co.*, 280 U.S. 369	7
Gilman v. *Philadelphia*, 3 Wall. 713	7
Mollohan v. *Gray*, 413 F.2d 349	6
Osborne v. *United States*, 145 F.2d 892	6
Reichelderfer v. *Quinn*, 287 U.S. 315	5
Shively v. *Bowlby*, 152 U.S. 1	7
Shoemaker v. *United States*, 147 U.S. 282	5
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53	7
United States v. *Cors*, 337 U.S. 325	5
United States v. *Cox*, 190 F.2d 293, certiorari denied, 342 U.S. 867	6, 8, 9
United States v. *85,237 Acres of Land, etc., in Zapata County, Texas*, 157 F. Supp. 150, affirmed, 252 F. 2d 116	9
United States v. *87.30 Acres in State of Washington* (*Stueckle*), 430 F. 2d 1130	6

447-348—71——1

Cases—Continued
United States v. *531.13 Acres of Land, Etc.*, (*Duke Power Co.*), 366 F. 2d 915, certiorari denied, 385 U.S. 1025 — Page 8
United States v. *Grand River Dam Authority*, 363 U.S. 229 — 7
United States v. *Honolulu Plantation Co.*, 182 F. 2d 172, certiorari denied, 340 U.S. 820 — 6
United States v. *Jaramillo*, 190 F. 2d 300 — 8, 9
United States v. *Miller*, 317 U.S. 369 — 5
United States v. *Petty Motor Co.*, 327 U.S. 372 — 6
United States v. *Rands*, 389 U.S. 121 — 3, 4, 7, 8
United States v. *Reynolds*, 387 U.S. 14 — 5
United States v. *River Rouge Co.*, 269 U.S. 411 — 8
United States v. *677.50 Acres in Marion County, Kan.* (*Clear Creek*), 420 F. 2d 1136, certiorari denied, 398 U.S. 928 — 6
United States v. *6,404.19 Acres in Phillips County, Mont.* (*Lock*) (D. Mont., Civil No. 2776), decided September 3, 1971, appeal pending — 5
United States v. *Willow River Co.*, 324 U.S. 499 — 7
United States ex rel. T.V.A. v. *Powelson*, 319 U.S. 266 — 6
Constitution and statutes:
United States Constitution:
Commerce Clause, Article I, Section 8 — 7
Fifth Amendment — 5, 6
P.L. 534, 78th Cong — 3
Taylor Grazing Act, 48 Stat. 1270, Section 3, as amended, 43 U.S.C. 315b — 2, 4, 6
Act of July 9, 1942, 56 Stat. 654, as amended, 43 U.S.C. 315q — 6
33 U.S.C. 701 — 2
40 U.S.C. 258a — 2
Miscellaneous:
Public Land Statistics, 1970, U.S. Department of the Interior, Bureau of Land Management — 4

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, PETITIONER

v.

CHESTER FULLER AND MAXINE FULLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. A, *infra*) is reported at 442 F. 2d 504.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on April 29, 1971. A timely petition for rehearing was denied on June 23, 1971 (App. C, *infra*). On September 16, 1971, Mr. Justice Douglas

extended the time for filing a petition for a writ of certiorari to and including October 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the owner of land taken by the United States is entitled to have included in the measure of his compensation the value of revocable grazing permits on adjoining federal land even though Congress specified that such grazing permits create no "right, title, interest, or estate in or to the lands."

STATUTE INVOLVED

Section 3 of the Taylor Grazing Act, 48 Stat. 1270, as amended, 43 U.S.C. 315b, provides in pertinent part:

> The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, * * * as under his rules and regulations are entitled to participate in the use of the range * * * [T]he issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands.

STATEMENT

In order to obtain land for the construction of the Alamo Dam and Reservoir Project in Arizona, the United States brought this condemnation proceeding under the authority of 40 U.S.C. 258a, 33 U.S.C. 701,

and P.L. 534, 78th Congress, to acquire title to 920 of 1,280 acres owned by the landowners.[1] At trial, the landowners contended that since the highest and best use of their land was that of a cattle ranch, the permitted use of the public domain lands should be considered in determining the fair market value of their land. The United States contended that the government should not be required to compensate a landowner for value created by the government by revocable permits to the landowner for grazing on adjacent public lands.

The district court adopted the landowners' theory and instructed the jury in part that "such permits are mere licenses which may be revoked and are not compensable as such. However, if you should determine that the highest and best use of the property taken is a use in conjunction with those permit lands, you may take those permits into consideration in arriving at your value of the subject land * * *" (App. A, pp. 11–12; 442 F. 2d at 505). The jury returned a verdict of $350,000 for the 920 acres taken (App. A, p. 11; 442 F. 2d at 505).

A divided court of appeals affirmed. The majority noted that in *United States* v. *Rands,* 389 U.S. 121, this Court held that the compensable value of riparian land did not include its special value as a port site on

[1] The landowners' ranch operation consisted of (App. A, 11; 442 F. 2d at 505):

	Acres
Fee land (920 acres taken)	1,280
State leased land	12,027
Taylor Act Grazing Land	31,461
Total	44,768

navigable water since the waters were the property of the nation, but held that *Rands* is distinguishable on the ground that, while the Taylor Grazing Act does not create any interest in the lands as such, "the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude" (App. A, p. 17, 442 F. 2d at 507). The dissenting judge was of the view that *Rands* controlled this case.

REASONS FOR GRANTING THE WRIT

The effect of the decision below is that the government, which has already subsidized cattle growers through the Taylor Grazing Act, is required, when it exercises its power of eminent domain, to pay again for values, not otherwise inherent in the property, that it has created through its largess. This holding is contrary to established principles of the law of eminent domain and, if allowed to stand, will cause confusion and threaten to introduce anomalies in the administration of federal lands.

1. At present, the Department of the Interior administers 132,669,112 acres of public land within grazing districts under revocable permits.[2] Virtually all grazing districts lie within the Ninth and Tenth Circuits. Most of the government's reclamation projects are located in this same area. Whenever a dam or other project is instituted to reclaim otherwise arid

[2] The Department also administers 26,469,723 acres of grazing lands under firm leases. Public Lands Statistics, 1970, U.S Department of the Interior, Bureau of Land Management page 29.

land or to protect land from destructive flood or erosion damage, significant areas must be acquired. Typically, both privately owned land and public domain lands will be needed in such projects. Much of the private land is held by persons who also have revocable permits for the use of public land. The present case is typical.[3]

2. In requiring the United States to pay landowners an increment reflecting the use of public lands owned by the government, the decision below contravenes the well-established principle of eminent domain law that the government does not pay for value which it has created. *Shoemaker* v. *United States,* 147 U.S. 282, 303–305; *United States* v. *Miller,* 317 U.S. 369, 376–379; *United States* v. *Cors,* 337 U.S. 325, 332–334; *United States* v. *Reynolds,* 397 U.S. 14, 16.

Further, when the United States exercises its power of eminent domain, the Fifth Amendment requires only that it pay for legal rights taken. This Court has consistently recognized that "the existence of value alone does not generate interests protected by the Constitution against diminution by the Government * * *." *Reichelderfer* v. *Quinn,* 287 U.S. 315, 319. The Fifth Amendment requires the United States to pay only for the taking of property rights, "not for opportunities which the owner may lose." *United*

[3] The same questions are presented in *United States* v. *6,404.19 Acres in Phillips County, Mont.* (Lock), D. Mont., Civil No. 2776, decided September 3, 1971, appeal pending. See also the cases discussed *infra.*

States ex rel. T.V.A. v. *Powelson,* 319 U.S. 266, 282. And both the Ninth and Tenth Circuits, in previous cases upholding the revocation of grazing permits without payment of compensation, have recognized that while grazing permits are of value to cattle operators, they do not constitute property rights protected by the Fifth Amendment.[4] *Osborne* v. *United States,* 145 F. 2d 892, 896 (C.A. 9); *United States* v. *Cox,* 190 F. 2d 293, 296 (C.A. 10), certiorari denied, 342 U.S. 867; *Mollohan* v. *Gray,* 413 F. 2d 349, 353 (C.A. 9). Cf. *Acton* v. *United States,* 401 F. 2d 896, 899–900 (C.A. 9), certiorari denied, 393 U.S. 1121, 395 U.S. 945.[5]

Indeed, Section 3 of the Taylor Grazing Act expressly declares that "* * * the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter, shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b. The

---

[4] The Act of July 9, 1942, 56 Stat. 654, as amemded, 43 U.S.C. 315q provides for compensation set by the head of the Department utilizing the land when permits are canceled for "war or national defense purposes". The present case does not involve such a purpose; moreover, this provision does not establish any compensable interest or right to compensation except that administratively provided under the Section. See *Osborne* v. *United States, infra.*

[5] Similarly, claimants have been denied compensation for the taking of lands of others in which they have no estate. *United States* v. *Petty Motor Co.*, 327 U.S. 372, 380; *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 175, 177 (C.A. 9), certiorari denied, 340 U.S. 820; *United States* v. *87.30 Acres in State of Washington (Stueckle)*, 430 F. 2d 1130, 1133 (C.A. 9); *United States* v. *677.50 Acres in Marion County, Kan. (Clear Creek)*, 420 F. 2d 1136 (C.A. 10), certiorari denied, 398 U.S. 928.

warding of compensation for enhancement due to possession of revocable permits issued under the Act violates this congressonal directive.

Moreover, as recognized by the dissent below, the rationale of *United States* v. *Rands,* 389 U.S. 121, is fully applicable here. By virtue of the Commerce Clause of the Constitution, Art. I, Sec. 8, the United States is deemed to own a servitude in the flow of navigable streams. Although land bordering on navigable streams enjoys special value in transactions between private individuals (*Boom Co.* v. *Patterson,* 98 U.S. 403; *Ford & Son* v. *Little Falls Co.,* 280 U.S. 69), navigable waters are deemed the "public property of the nation." *Gilman* v. *Philadelphia,* 3 Wall. 713, 725.[6] No expectation of profit from this resource can attach to adjacent private lands which is chargeable in condemnation against the United States; when the United States appropriates the flow of navigable waters, it is "beholden to no one." *United States* v. *Grand River Dam Authority,* 363 U.S. 229, 233. Consequently, special values which inhere in the

[6] See *United States* v. *Willow River Co.,* 324 U.S. 499, 509; *United States v. Chandler-Dunbar Co.,* 229 U.S. 53, 69. The government's interest in a navigable stream amounts, however, to only a quasi-proprietary interest. For instance, the United States does not have fee ownership of the riverbed. *Shively* v. *Bowlby,* 152 U.S. 1, 31. Fee title rests either in the state or in the riparian owner. *United States* v. *Chandler-Dunbar Co.,* 229 U.S. 53, 60. Because the government's proprietary interest in navigable waters is thus limited, the present case presents facts even stronger against compensation than *Rands.*

flow of the stream are allocable to the public; they are not private interests and accordingly are excluded from compensation paid to private landowners. *United States* v. *River Rouge Co.*, 269 U.S. 411. The denial of compensation applies to existing uses, as well as to theoretical or potential uses. See, *e.g.*, *United States* v. *531.13 Acres of Land, Etc.*, (*Duke Power Co.*), 366 F. 2d 915 (C.A. 4), certiorari denied, 385 U.S. 1025. As this Court explained in *Rands*, 389 U.S. at 125, "To require the United States to pay for this * * * value [the value of a right that the government in the exercise of its dominant servitude can grant or withhold as it chooses] would be to create private claims in the public domain." The decision below upholds just such an impermissible claim in the public domain.

3. In *United States* v. *Cox*, 190 F. 2d 293 (C.A. 10), certiorari denied, 342 U.S. 867, the government condemned a ranch comprised of fee land, state leased land and public domain land held under revocable permit, and revoked the permits coincidental with the taking. The court held that the availability and accessibility of public domain lands could not be considered in fixing compensation for the base land in that case. But in *United States* v. *Jaramillo*, 190 F. 2d 300, decided the same day as *Cox*, the Tenth Circuit allowed the jury to consider the value of grazing permits on adjacent public lands when evaluating the fee when, unlike *Cox*, on the date of taking, the permits had not been revoked.

Whether revocation occurred prior to the taking should not be controlling. As the dissent in *Cox* pointed out, the grazing permits even in *Cox* had not been physically revoked on the date of taking. 190 F. 2d at 298. The fact is that there was in that case an irreconcilable conflict between the taking of the cattle rancher's fee base lands and the continuance of permitted grazing upon dependent public domain lands. Exactly the same conflict existed in *Jaramillo*. To make the case turn upon the presence or absence of formal revocation is to exalt form over substance. Cf. *United States* v. *85,237 Acres of Land, etc., in Zapata County, Texas*, 157 F. Supp. 150 (S.D. Tex.), affirmed, 252 F. 2d 116 (C.A. 5).

Cox, Jaramillo, and the instant case taken together make the measure of compensation depend on the choice of the government in cancelling the grazing permits simultaneously with the legal taking of the land or letting the permits remain in effect until the land is physically needed by the government. The attachment of these consequences to the government's choice introduces unfortunate and essentially extraneous considerations into federal land management and tends to undermine the purpose of the Taylor Grazing Act to foster economic use of public lands. Acquiring agencies have found that a substantial time elapses between the filing of a condemnation action and the actual need for the land taken. In order to minimize economic hardship, therefore, these agencies have declined to revoke outstanding permits; and this additional time often enables the government to relocate a rancher's grazing land

and to continue to receive revenues for the use of the land. If this sensible policy is to be discouraged by the burden of greatly increased land acquisition costs, it may have to be modified, to the disadavantage of both cattle raisers and the public interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.
RAYMOND N. ZAGONE,
JACQUES B. GELIN,
Attorneys.

OCTOBER 1971.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23,932

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CHESTER FULLER AND MAXINE FULLER (939.62 ACRES OF LAND, MORE OR LESS, IN YUMA AND MOHAVE COUNTIES, STATE OF ARIZONA), DEFENDANT-APPELLEES.

[April 29, 1971]

Appeal from the United States District Court for the District of Arizona

---

Before: ELY, WRIGHT and KILKENNY, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal in a condemnation action from udgment entered on a jury verdict fixing $350,000 s just compensation for the taking of two tracts otalling 920 acres. This court has jurisdiction under 8 U.S.C. § 1291.On appeal by the United States, we ffirm.

The land taken was used by the landowners, Mr. nd Mrs. Fuller, as part of a 44,768-acre ranch opera- on composed of:

	Acres
Fee land	1,280
State leased land	12,027
Federal domain leased under the Taylor Grazing Act (43 U.S.C. § 315b)	31,461
Total	44,768

inconsistent with that of *United States v. Rands*, 389 U.S. 121 (1967). *Rands* was a navigational servitude case. There the Court held that the compensable value of private riparian fast lands taken by the government did not include its special value as a port site since the owner had no right of access to the navigable waters which could be legally protected as against the United States.

A careful examination of the rationale of the navigational servitude cases and the federal legislation regarding grazing permits gives rise to a basis for distinguishing the cases relied upon by the government. In *Rands*, it was said:

> "The Commerce Clause confers a unique position upon the Government in connection with navigable waters. 'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States. . . . For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress.' *Gilman v. Philadelphia*, 3 Wall. 713, 724-725 (1866). This power to regulate navigation confers upon the United States a 'dominant servitude,' *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954), which extends to the entire stream and the stream bed below ordinary high-water mark. The proper exercise of this power is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject. . . . Thus, without being constitutionally obligated to pay compensation, the United States may

> change the course of a navigable stream, . . . or otherwise impair or destroy a riparian owner's access to navigable waters, . . . even though the market value of the riparian owner's land is substantially diminished." *Unitd States* v. *Rands,* 389 U.S. at 122–123.

Similarly, in *United States v. Twin City Power Co.,* 350 U.S. 222 (1956), the dominant navigational servitude was held to entitle the government to condemn land without considering its special value as a hydroelectric site.

The government is correct in its assertion that the constitutional provision and subsequent court interpretation authorized Congress to regulate navigable streams to the total exclusion of private rights. *United States* v. *Rands,* 389 U.S. 121, 123. However, when Congress legislates in a manner that recognizes special rights or privileges in navigable waters, then the government is required to compensate for the destruction of such rights, notwithstanding the fact that Congress had the constitutional power to exclude private rights completely. *United States* v. *Twin City Power Co., supra,* at 225.

A study of the Taylor Grazing Act leads to the conclusion that Congress exercised less than its constitutional power over public lands and recognized special rights against third parties and sometimes the government itself. Unlike navigational servitude, there are some private rights and privileges bestowed and protected by the Act which justify the conclusion that the uses to which federal grazing lands are dedicated are unlike the undiminished public uses of navigable streams.

For example, the Act creates section 3 lands and section 15 lands. The later are disconnected, noncontiguous tracts which are not contained in grazing

districts. Section 3 lands, involved here, are located within grazing districts and are administered by the Secretary of the Interior through a system of preferential grazing permits. These run as long as ten years and permit holders have a preferential right to renewal. 43 U.S.C. § 315b.

Though the Act does not create any interest in the lands themselves, it does require that "grazing privileges recognized and acknowledged shall be adequately safeguarded" by the government. 43 U.S.C. § 315b. *See Red Canyon Sheep Co.* v. *Ickes,* 98 F.2d 308, 314 (D.C. Cir. 1938).

While grazing permits are unrevoked, neither the grantor nor third party may interfere with their exercise. In fact, the government has an affirmative obligation to safeguard them adequately. *Oman* v. *United States,* 179 F.2d 738 (10th Cir. 1949).

> "Other courts have held that these permits conferred rights subject to judicial protection. In Arizona the holder of similar grazing permits was said to be entitled to an action of trespass against encroaching ranchers. *Garcia* v. *Sumrall,* 58 Ariz. 526, 121 P. 2d 640. Even the opinion in the *Osborne* case, *supra,* implied that these permits would be 'highly valuable as between private persons'. . . . In the *Red Canyon Sheep Co.* case, 98 F. 2d 308, it was held that, whatever the rights accruing under the permits be denominated, they were entitled to equitable protection." *Oman* at pp. 741–42.

In *McNeil* v. *Seaton,* 281 F. 2d 931 934 (D.C. Cir. 1960), the court held that a new grazing district rule could not be applied to one who had obtained his permit during the first priority period established by the Act. In so holding, the court said that while the permits exist, "they are something of real value . . . which have their source in an enactment of Con-

gress." The court concluded by saying that the permit holders can be protected against wrongful interference by the United States with the statutory rights or privileges represented by the permits.

Thus it can be seen that the government's control over Taylor Grazing Act lands is not the same as the absolute control enjoyed under the navigational servitude.

There is another basis for distinguishing the navigational servitude cases represented by *Rands* and *Twin City*. In those cases the issue was whether the government should pay additional compensation for the theoretical value of potential uses, *i.e.*, port sites and hydroelectric operation. Actual investments had not occurred. There was no congressional policy of use and development of navigable waters as a part of private commercial enterprises.

In situations where the government has requested private investment to help develop and utilize navigable waters, then the government has had to pay the "going concern" value upon condemnation. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312 (1893). In *Monongahela* the government had to pay both for locks and a dam built at the government's invitation.

The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela.* The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was

admonished to consider the possibility that the permits might be withdrawn at any time without compensation.

The government's remaining arguments are without merit. Some rely on cases which are distinguishable because the permits were cancelled and the holders of the permits were seeking compensation.[1] Other contentions are answered by *Jaramillo,* with which decision we are in accord.

Affirmed.

KILKENNY, Circuit Judge (dissenting):

I believe that *United States* v. *Rands,* 389 U.S. 121 (1967), controls on the federal lands and that the judgment of the lower court should be reversed.

---

[1] *Osborne* v. *United States*, 145 F.2d 892 (9th Cir. 1944). *Acton* v. *United States*, 401 F.2d 896 (9th Cir. 1968), *cert. den.* 393 U.S. 1121 and 395 U.S. 945. *Mollohan* v. *Gray*, 413 F.2d 349 (9th Cir. 1969).

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 23,932

CHESTER FULLER AND MAXINE FULLER, APPELLANT (939.62 ACRES OF LAND, MORE OR LESS, SITUATED IN YUMA AND MOHAVE COUNTIES, ARIZONA)

v.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgement of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 29, 1971.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Wednesday, June 23, 1971

Before: ELY, WRIGHT and KILKENNY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed June 16, 1971 and within time allowed therefor and valid extension thereof by rule of court, for a rehearing of above cause be, and hereby is denied.

U.S. GOVERNMENT PRINTING OFFICE: 1971